

2008

State of Utah v. Bryan Waterfield : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff / Appellee,)	Case No. 20080949-CA
)	consolidated with:
v.)	20080952-CA
)	20080974-CA
BRYAN WATERFIELD,)	20080975-CA
)	
Defendant / Appellant.)	

BRIEF OF APPELLANT

Appeal from Sentence entered on October 6, 2008, in the Second
District Court, Davis County, the Honorable Jon M. Memmott,
presiding

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STATEMENT OF JURISDICTION

The Utah Court of Appeals is conferred with jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. The trial court erred by determining, sua sponte, that the 04/14/08 sentence was an illegal sentence pursuant to Rule 22(e). Whether a sentence is illegal and qualifies for review under Rule 22(e) is a question of law, which is reviewed for correctness. *State v. Thorkelson*, 2004 UT App 9, ¶9, 84 P.3d 854 (citing *State v. Telford*, 2002 UT 51, ¶¶13-14, 48 P.3d 228 (per curiam)). Rule 22(e) permits the appellate court to consider the legality of a sentence even if the issue is raised for the first time on appeal. See *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995); *State v. Clark*, 913 P.2d 360, 362 (Utah Ct. App. 1996) (citing *Brooks*, 908 P.2d at 860).

Alternatively, the court should consider the issue under the plain error doctrine. The requirements for plain error are that an error must have occurred, must have been harmful, and should have been obvious to the trial court. See *State v. Beck*, 2007 UT 60, ¶10, 165 P.3d 1225. An error is harmful if "absent the error there is a reasonable likelihood of a more favorable outcome for the defendant." *Id.*

Preservation of Issue Citation or Statement of Grounds for Review:

Issues involving the review of a sentence pursuant to Rule 22(e) constitute an exception to the preservation rule and as such may be raised for the first time on appeal. This also applies to issues involving plain error.

2. Whether the sentencing court, by failing to duly consider the objections to the presentence report and thereby failing to specifically resolve them on the record, failed to comply with its legal duty to properly resolve presentence investigation report objections. "Whether the sentencing court properly complied with a legal duty to resolve on the record the accuracy of contested information in sentencing reports is a question of law that [the appellate court] review[s] for correctness." *State v. Veteto*, 2000 UT 62, ¶13, 6 P.3d 1133 (citing *State v. Kohl*, 2000 UT 35, ¶32, 999 P.2d 7).

Preservation of Issue Citation or Statement of Grounds for Review:

Mr. Waterfield preserved this issue by way of his objections to Presentence Report set forth at R. 470:19-30.

3. Whether appointed trial counsel, to the extent that there was no affirmative request that the sentencing court exercise its fact finding function to resolve the remaining presentence report objections, denied Mr. Waterfield of his Sixth Amendment right to the effective assistance of counsel. To make

such a showing, a defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). The appellate court reviews such a claim as a matter of law. *State v. Robertson*, 2005 UT App 419, ¶5, 122 P.3d 895; *State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376; *State v. Strain*, 885 P.2d 810, 814 (Utah Ct. App. 1994).

Preservation of Issue Citation or Statement of Grounds for Review:

Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

DETERMINATIVE AUTHORITY

U.S. Const. amend. VI.....

The constitutional provisions, statutes, ordinances, rules, regulations, or case law whose interpretation is determinative, if any, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief of Appellant.

STATEMENT OF THE CASE

In December, 2007, Mr. Waterfield entered a plea of guilty to Distribution of or Arranging to Distribute a Controlled Substance (Methamphetamine) and Possession of a Controlled Substance

(Heroin) in a Drug Free Zone, both second-degree felonies. The district court sentenced Mr. Waterfield to two consecutive indeterminate terms of one to fifteen years in the Utah State Prison, which the court suspended. The court then sentenced Mr. Waterfield to one year in jail and 72 months of probation.

Upon admitting to violations of probation on April 14, 2008, the court revoked and reinstated probation, sentencing Mr. Waterfield to one year in jail and ordering him to be screened, enter into, and complete the RSAT Program. Shortly thereafter, Mr. Waterfield was briefly screened for entry into the RSAT Program.

By way of Report filed May 15, 2008, AP&P alleged, based on the screening, that Mr. Waterfield had violated probation by failing to enter into, participate in, or complete the RSAT Program as directed by the court. At the subsequent hearing on May 19, 2008, by way of stipulation, the court sentenced Mr. Waterfield to the original two indeterminate, consecutive terms of one to fifteen years in the Utah State Prison.

On September 8, 2008, the district court sua sponte suspended the sentence imposed on April 14, 2008, as an illegal sentence pursuant to Rule 22(e) of the Utah Rules of Criminal Procedure.

At sentencing, Mr. Waterfield raised numerous objections to the Presentence Report, which corrections the court simply

accepted. The district court sentenced Mr. Waterfield to two indeterminate terms of not less than one year nor more than fifteen years in the Utah State Prison to be served consecutively.

The Sentence, Judgment, Commitment was signed by the district court on October 8, 2008. Mr. Waterfield filed a timely pro se Notice of Appeal.

STATEMENT OF FACTS

1. On December 10, 2007, Mr. Waterfield appeared with trial counsel before the district court and entered a plea of guilty to Distribution of or Arranging to Distribute a Controlled Substance (Methamphetamine) and Possession of a Controlled Substance (Heroin) in a Drug Free Zone, both second-degree felonies (R. 180). As part of the plea agreement, all remaining charges in all other cases were dismissed (R. 183).

2. That same day Mr. Waterfield executed a Statement of Defendant in Support of Guilty Pleas and Certificate of Counsel (R. 180-87).

3. Based on the guilty pleas, the district court sentenced Mr. Waterfield to two consecutive indeterminate terms of not less than one year nor more than fifteen years in the Utah State Prison, which the court suspended (R. 165). The court then sentenced Mr. Waterfield to one year in jail and 72 months of

probation to be supervised by Adult Probation & Parole (AP&P) (R. 166).

4. Pursuant to a subsequent AP&P Progress/Violation Report and Affidavit in Support of Order to Show Cause, the parties appeared for an Order to Show Cause Hearing on April 14, 2008 (R. 459A). After Mr. Waterfield's admissions, the court revoked his probation, which it then reinstated for 72 months to begin as of that same date (R. 211). See R. 210-11, Post Sentencing Judgment/Commitment, a true and correct copy of which is attached to this Brief as Addendum A. The court sentenced Mr. Waterfield to one year in the Davis County Jail with commitment to begin immediately, and then ordered Mr. Waterfield to be screened, enter into, and complete the RSAT¹ Program (*Id.*).

5. On April 29, 2008, Mr. Dave Hoffman of Davis Behavioral Health met briefly with Mr. Waterfield to screen him for entry into the RSAT Program (R. 230; R. 346).

6. By way of a Progress/Violation Report filed May 15, 2008, AP&P alleged, based on Mr. Hoffman's screening of Mr. Waterfield, that Mr. Waterfield's diagnosis indicated the need for long term, intensive inpatient treatment rather than the RSAT Program (R. 231). Based on this, AP&P claimed that Mr. Waterfield

¹Residential Substance Abuse Treatment (R. 346).

had violated probation by failing to enter into, participate in, or complete the RSAT Program as directed by the court (R. 233-34).

7. At the subsequent hearing on May 19, 2008, pursuant to a stipulation of the parties that Mr. Waterfield had not been accepted into the RSAT Program, the court sentenced Mr. Waterfield to the original two indeterminate terms of not less than one year nor more than fifteen years in the Utah State Prison to be served consecutively (R. 237-38).²

8. In a Motion to Appoint Counsel filed by Mr. Waterfield's retained trial counsel, counsel asserted the illegality of the sentence imposed on May 19, 2008, due to Mr. Waterfield being illegally denied access to the RSAT Program, that the level of addiction had been improperly inflated by the State, that the court did not hear from conflicting witnesses regarding Mr. Waterfield's denial to the RSAT Program, and that probation had been improperly revoked due to no fault of Mr. Waterfield (R. 281).³

²During the hearing, Mr. Waterfield's trial counsel informed the court of various discrepancies between the level of addiction asserted by the State by way of the RSAT assessment and the Serenity House assessment of Mr. Waterfield (R. 461:4-5).

³By way of a pro se Rule 22(e) Motion filed on July 1, 2008, Mr. Waterfield asserted that the court had imposed an illegal sentence based on the grounds set forth in trial counsel's Motion to Appoint Counsel (R. 299-303).

9. During a review hearing on July 28, 2008, newly appointed counsel requested an evidentiary hearing on Mr. Waterfield's pro se Rule 22(e) Motion (R. 466:2:7-9).

10. At the scheduled evidentiary hearing on August 25, 2008, appointed trial counsel subpoenaed Mr. Dave Hoffman and Ms. Kimberly Holden to provide testimony concerning the RSAT screening and assessment matter (R. 467:2:12-14).⁴ During that hearing, the trial court expressed its concern that the State had abused its discretion in the course of screening Mr. Waterfield, and that such an abuse of discretion may have violated his right to due process (R. 467:5:9-16).

11. During a Review Hearing on September 8, 2008, the district court sua sponte suspended the sentence imposed on April 14, 2008, as an illegal sentence pursuant to Rule 22(e) of the Utah Rules of Criminal Procedure (R. 468:2-3).⁵ See R. 468, 09/08/08 Review Hearing, a true and correct copy of which is attached to this Brief as Addendum B. As a result of the ruling, the court stated, "[W]e're back right there. We're at the date of

⁴Appointed trial counsel apparently chose not to call these witnesses without first obtaining the court's ruling and resolution of the State's motion concerning zero tolerance as set forth in the terms of probation (R. 467:16:1-9; 467:7:1-18).

⁵In a subsequent ruling, the district court also determined that the sentencing on May 19, 2008, was invalid due to the lack of a knowing and voluntary waiver of a Presentence Report by Mr. Waterfield (R. 382).

April 14. [Mr. Waterfield] has just admitted his probation violations, and so now I'm going to have that sentencing." (R. 468:2:19-22).⁶

12. About a week later during an informal, in-chambers hearing⁷ on the RSAT Program assessment utilized by the State, the court expressed concern that Mr. Waterfield had not been properly screened for the RSAT Program (R. 469:6-7). The court also expressed concern that the State had not made a record of the criteria that had disqualified Mr. Waterfield from the RSAT Program (R. 469:16:2-4).

13. After listening to the State's informal explanation of the RSAT Program assessment, the district court became "comfortable" with the situation (R. 469:39:4-8). Appointed trial counsel did not make any presentation (R. 469:26:14-16).

14. At sentencing, Mr. Waterfield raised numerous objections to the Presentence Report (R. 470:24-30). The district court then simply accepted those corrections (R. 470:30:24-25).

15. The district court sentenced Mr. Waterfield to two indeterminate terms of not less than one year nor more than

⁶The district court opined that its ruling rendered the issues surrounding the RSAT Program screening moot even though the court continued to harbor concerns about the validity of the screening (R. 468:2:23-25; 468:3:10-11; and 468:9:11-16).

⁷Mr. Waterfield was not present at this hearing (R. 334).

fifteen years in the Utah State Prison to be served consecutively (R. 388-89).

16. The Sentence, Judgment, Commitment was signed by the district court on October 8, 2008, which accordingly was entered that same day (R. 387-89). See R. 387-89, Sentence, Judgment, Commitment, a true and correct copy of which is attached to this Brief as Addendum C.

17. On October 14, 2008, Mr. Waterfield filed a timely pro se Notice of Appeal (R. 391-93).

SUMMARY OF ARGUMENTS

1. The trial court erred by determining, sua sponte, that the 04/14/08 sentence was an illegal sentence pursuant to Rule 22(e). The trial court failed to utilize the proper standard in the course of setting aside the sentence imposed on 04/14/08 as an illegal sentence. Accordingly, the court's basis for setting aside or suspending the 04/14/08 sentence constitutes a "run-of-the-mill" error, if any, that is not reviewable under Rule 22(e).

As a result of its Rule 22(e) ruling, the district court precluded Mr. Waterfield from challenging the dubious RSAT Program assessment. This, in turn, precluded Mr. Waterfield from having the court legitimately consider him for a residential drug treatment program such as the RSAT Program.

2. By failing to duly consider the objections to the presentence report and thereby failing to specifically resolve them on the record, the sentencing court failed to comply with its legal duty to properly resolve presentence investigation report objections. The record demonstrates that the sentencing court failed to duly consider all the inaccuracies set forth in the Presentence Report.

The sentencing judge's general statement concerning its resolution of the inaccuracies of Mr. Waterfield's Presentence Report is insufficient. In fact, the sentencing judge failed to make the specific findings on the record as mandated by the statute. By failing to duly consider the inaccuracies, the sentencing court did not comply with its duty to properly resolve Mr. Waterfield's objections.

3. To the extent that there was no affirmative request that the sentencing court exercise its fact finding function to resolve the remaining presentence report objections, appointed trial counsel denied Mr. Waterfield of his Sixth Amendment right to the effective assistance of counsel. Appointed trial counsel's failure fell below an objective standard of reasonable professional judgment. This is demonstrated by existing Utah case law, as previously discussed, the plain language of Utah Code Ann.

§ 77-18-1(6)(a), and the underlying factual circumstances of this case.

But for counsel's unprofessional failure to request that the sentencing court utilize its fact finding function, the result at sentencing would have been different. Had the sentencing court been alerted of its obligation, the court more likely than not would have duly considered the inaccuracies set forth in the presentence investigation report, which, in turn, would have allowed the sentencing court to more fully and accurately consider the fact that Mr. Waterfield, to that point, had no real inpatient drug treatment program to help treat his addiction.

ARGUMENTS

I. THE TRIAL COURT ERRED BY DETERMINING, SUA SPONTE, THAT THE 04/14/08 SENTENCE WAS AN ILLEGAL SENTENCE PURSUANT TO RULE 22(e).

According to Utah Rule of Criminal Procedure 22(e), "The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." See Utah R. Crim. P. 22(e). "While rule 22(e) allows a court to review an illegal sentence at any time, it must be 'narrowly circumscribed' to prevent abuse." *State v. Thorkelson*, 2004 UT App 9, ¶15, 84 P.3d 854 (quoting *State v. Telford*, 2002 UT 51, ¶5, 48 P.3d 228 (per curiam)).⁸

⁸Rule 22(e) permits the appellate court to consider the legality of a sentence even if the issue is raised for the first time on

According to Utah case law, an illegal sentence reviewable under Rule 22(e) is a "patently" illegal sentence⁹ or a "manifestly" illegal sentence.¹⁰ "A 'patently' or 'manifestly' illegal sentence generally occurs in one of two situations: (1) where the sentencing court has no jurisdiction, or (2) where the sentence is beyond the authorized statutory range." *State v. Garner*, 2008 UT App 32, ¶17, 177 P.3d 637 (quoting *Thorkelson*, 2004 UT App 9 at ¶15). In contrast, "errors [that] . . . can be described as ordinary or 'run-of-the-mill' errors [are] regularly reviewed on appeal under rule 4(a) of the Utah Rules of Appellate Procedure 'and do not qualify for review under rule 22(e).'" *Id.*

In *State v. Yazzie*, 2009 UT 14, 203 P.3d 984, the Utah Supreme Court found the following definition of an illegal sentence to be appropriate:

[An illegal sentence is] one which is ambiguous with respect to the time and manner which it is to be served, is internally contradictory, omits a

appeal. See *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995); *State v. Clark*, 913 P.2d 360, 362 (Utah Ct. App. 1996) (citing *Brooks*, 908 P.2d at 860). Alternatively, this court should consider the issue under the plain error doctrine. The requirements for plain error are that an error must have occurred, must have been harmful, and should have been obvious to the trial court. See *State v. Beck*, 2007 UT 60, ¶10, 165 P.3d 1225. An error is harmful if "absent the error there is a reasonable likelihood of a more favorable outcome for the defendant." *Id.*

⁹See *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995).

¹⁰See *State v. Telford*, 2002 UT 51, ¶5, 48 P.3d 228 (per curiam).

term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.

See id. (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997) (internal quotations omitted)). Consistent with the foregoing definition, such "run-of-the-mill" errors are not reviewable under Rule 22(e), which include errors such as the denial of due process resulting from a trial court's failure to consider mitigating evidence, *see Garner*, 2008 UT App 32 at ¶12, or a trial court's failure to consider requisite statutory factors before imposing consecutive sentences. *See Thorkelson*, 2004 UT App 9 at ¶12.

In this case, the parties appeared pursuant to an AP&P probation violation report and affidavit for an order to show cause hearing on April 14, 2008. Upon Mr. Waterfield's admissions, the court revoked his probation, which it then reinstated for 72 months, and sentenced Mr. Waterfield to one year in the Davis County Jail, ordering Mr. Waterfield to be screened, enter into, and complete the RSAT Program. Shortly thereafter, a brief screening took place by way of an interview of Mr. Waterfield.

By way of a violation report filed May 15, 2008, AP&P alleged, based on the screening, that Mr. Waterfield had violated

probation by failing to enter into, participate in, or complete the RSAT Program as directed by the court. Based on the screening, AP&P believed Mr. Waterfield needed an intensive inpatient treatment rather than the RSAT Program.

At a hearing on May 19, 2008, pursuant to stipulation, the court sentenced Mr. Waterfield to the original two indeterminate terms of not less than one year nor more than fifteen years in the Utah State Prison to be served consecutively. During the hearing, Mr. Waterfield's trial counsel informed the court of various discrepancies between the level of addiction asserted by the State by way of the RSAT assessment and a Serenity House assessment of Mr. Waterfield.

In a Motion to Appoint Counsel, Mr. Waterfield's retained trial counsel asserted the illegality of the sentence imposed on May 19, 2008, due to Mr. Waterfield being illegally denied access to the RSAT Program, that the level of addition had been improperly inflated by the State, that the court did not hear from conflicting witnesses regarding Mr. Waterfield's denial to the RSAT Program, and that probation had been improperly revoked due to no fault of Mr. Waterfield.

At a review hearing on September 8, 2008, the district court sua sponte suspended the sentence imposed on April 14, 2008, as an illegal sentence pursuant to Rule 22(e) of the Utah Rules of

Criminal Procedure.¹¹ The court determined the sentence to be illegal due to having failed to suspend the sentence prior to sentencing Mr. Waterfield to jail. As a result of the Rule 22(e) ruling, the court stated, "[W]e're back right there. We're at the date of April 14. [Mr. Waterfield] has just admitted his probation violations, and so now I'm going to have that sentencing." (R. 468:2:19-22).¹²

In light of the foregoing Utah case law, the trial court failed to utilize the proper standard in the course of setting aside the sentence imposed on April 14, 2008, as an illegal sentence. Accordingly, the court's basis for setting aside or suspending the 04/14/08 sentence constitutes a "run-of-the-mill" error, if any, that is not reviewable under Rule 22(e).¹³

Consequently, the district court, by way of its ruling, precluded Mr. Waterfield from challenging the dubious RSAT Program assessment. This, in turn, precluded Mr. Waterfield from having

¹¹The district court also determined that the sentencing on May 19, 2008, was invalid due to the lack of a knowing and voluntary waiver of a Presentence Report by Mr. Waterfield (R. 382).

¹²Based on that ruling, the district court apparently concluded that its ruling rendered the issues surrounding the RSAT Program screening moot even though the court continued to harbor concerns about the validity of the screening (R. 468:2:23-25; 468:3:10-11; and 468:9:11-16).

¹³This also applies to the reasoning utilized by the district court in setting aside the sentence imposed on May 19, 2008.

the court legitimately consider him for a residential drug treatment program such as the RSAT Program.

II. BY FAILING TO DULY CONSIDER THE OBJECTIONS TO THE PRESENTENCE REPORT AND THEREBY FAILING TO SPECIFICALLY RESOLVE THEM ON THE RECORD, THE SENTENCING COURT FAILED TO COMPLY WITH ITS LEGAL DUTY TO PROPERLY RESOLVE PRESENTENCE INVESTIGATION REPORT OBJECTIONS.

According to Utah Code Ann. § 77-18-1(6)(a), which provides in relevant part:

Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

Utah Code Ann. § 77-18-1(6)(a); *see also State v. Maroney*, 2004 UT App 206, ¶26, 94 P.3d 295. "Whether the trial court properly complied with a legal duty to resolve on the record the accuracy of contested information in sentencing reports is a question of law that [the appellate court] review[s] for correctness." *State v. Veteto*, 2000 UT 62, ¶13, 6 P.3d 1133 (citing *State v. Kohl*, 2000 UT 35, ¶32, 999 P.2d 7).

A. Duty to Consider Objections to Presentence Investigation Report

As a matter of compliance, Utah Code Ann. § 77-18-1(6)(a) "requires the sentencing judge to consider the party's objections to the report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to the issue of sentencing." *State v. Jaeger*, 1999 UT 1, ¶44, 973 P.2d 404; *State v. Maroney*, 2004 UT App 206, ¶26, 94 P.3d 295. "If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived." See Utah Code Ann. § 77-18-1(6)(b).

B. Failure of Sentencing Judge to Duly Consider Objections and Resolve the Inaccuracies

The record demonstrates that the sentencing court failed to duly consider the inaccuracies set forth in the Presentence Report. At sentencing, Mr. Waterfield, through appointed counsel, raised numerous objections to the Presentence Report, including incorrect drug treatment programs in which, according to AP&P, Mr. Waterfield had participated (R. 470:19-30). Thereafter, the court simply stated that it would "accept those additional corrections." (R. 470:30:24-25). As a result, the objections were not resolved as contemplated by Utah Code Ann. § 77-18-1.

The sentencing judge's general statement concerning the inaccuracies of Mr. Waterfield's Presentence Report is insufficient. *Cf. State v. Veteto*, 2000 UT 62, ¶14, 6 P.3d 1137. In fact, the sentencing judge "failed to make the specific findings on the record as mandated by the statute." *Id.* at ¶15. By failing to duly consider the inaccuracies, the sentencing court did not comply with its duty to properly resolve Mr. Waterfield's objections.

III. TO THE EXTENT THAT THERE WAS NO AFFIRMATIVE REQUEST THAT THE SENTENCING COURT EXERCISE ITS FACT FINDING FUNCTION TO RESOLVE THE PRESENTENCE REPORT OBJECTIONS, APPOINTED TRIAL COUNSEL DENIED MR. WATERFIELD OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The United States Supreme Court, in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), established a two-prong test for determining when a defendant's Sixth Amendment¹⁴ right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. This test - adopted by Utah courts - requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment

¹⁴The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

and, second, that counsel's performance prejudiced the defendant." *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," or, in this case, a fair sentencing. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

To satisfy the first prong of the test, a defendant must "identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

To the extent that appointed trial counsel failed to specifically request that the sentencing court exercise its fact finding function to resolve the remaining inaccuracies in the presentence report, he committed ineffective assistance of counsel. Trial counsel's failure fell below an objective standard of reasonable professional judgment. This is demonstrated by existing Utah case law, as previously discussed, the plain language of Utah Code Ann. § 77-18-1(6)(a), and the underlying factual circumstances of this case.

But for counsel's unprofessional failure to request that the sentencing court utilize its fact finding function, the result at sentencing would have been different. Had the sentencing court been alerted of its obligation, the court more likely than not would have duly considered the inaccuracies set forth in the presentence investigation report, which, in turn, would have allowed the sentencing court to more fully and accurately consider

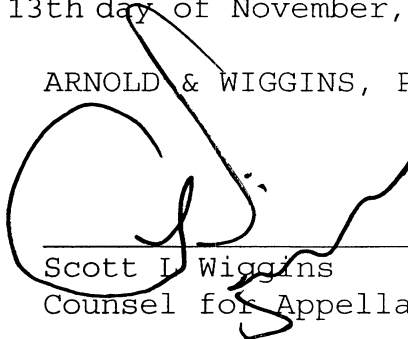
the fact that Mr. Waterfield, to that point, had no real inpatient drug treatment program to help treat his addiction.

CONCLUSION

Based on the foregoing, Mr. Waterfield respectfully requests that this Court reverse the trial court's sua sponte Rule 22(e) ruling and remand the case for further proceedings consistent with this Court's determination.

RESPECTFULLY SUBMITTED this 13th day of November, 2009.

ARNOLD & WIGGINS, P.C.

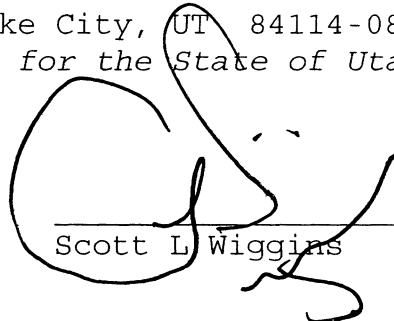


Scott L. Wiggins
Counsel for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 18 day of November, 2009:

Mr. J. Frederic Voros, Jr.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Counsel for the State of Utah



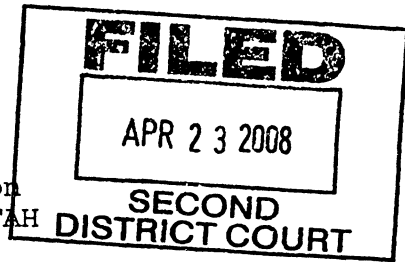
Scott L Wiggins

ADDENDA

Addendum A: Post Sentencing Judgment/Commitment
Addendum B: 09/08/08 Review Hearing
Addendum C: Sentence, Judgment, Commitment

Tab A

4/25/2008 12:44:11 PM081



2nd District - Farmington
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : POST SENTENCING
JUDGMENT/COMMITMENT
: AP&P ORDER TO SHOW CAUSE
:
:
vs. : Case No: 061700802 FS
:
BRYAN WATERFIELD, : Judge: JON M. MEMMOTT
Defendant. : Date: April 14, 2008

PRESENT

Clerk: kellyr

Prosecutor: WESTMORELAND, RICK T

Defendant

Defendant's Attorney(s): HUNT, ELIZABETH

DEFENDANT INFORMATION

Date of birth: January 11, 1967

Video

Tape Number: 7-041408 Tape Count: 9:25/9:45

CHARGES

1. DISTRIBUTE/OFFER/ARRANGE TO DIST C/S - 2nd Degree Felony

Plea: Guilty - Disposition: 12/10/07 Guilty

5. POSSESSION OF A CONTROLLED SUBSTANCE (amended) - 2nd Degree Felony

Plea: Guilty - Disposition: 12/10/07 Guilty

HEARING

Ms. Hunt addresses the Court. Mr. Westmoreland makes statements. Defendant makes statements. Hearing proceeds as follows:

Minutes - Post Sentencing



CD24266252

pages

061700802 WATERFIELD,BRYAN

4/23/2008 12:44:11 PM 002

Case No: 061700802
Date: Apr 14, 2008

SENTENCE, JUDGMENT and COMMITMENT

The defendant admits the following numbered allegations as stated in the Affidavit and Order to Show Cause: 1, 2 and 3

The defendant's probation is revoked.

The defendant's probation is reinstated for 72 months beginning April 14, 2008.

OTHER: All previous terms and conditions of probation will remain.

SENTENCE JAIL

Defendant is to serve 12 Months in the Davis County Jail.
Defendant is to report to the Davis County Jail for service.
Commitment is to begin immediately.
To the Davis County Sheriff: The defendant is remanded to your custody for confinement.

POST SENTENCE JAIL NOTE

Defendant is to be screened, enter into and complete the RSAT Program.

Per court order, probation was revoked in Court but should have been revoked and reinstated. Court so orders that in this minute entry.

Dated this 21 day of April, 2008.


JON M. MEMMOTT
District Court Judge

Tab B

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IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
PLAINTIFF,)	
)	DIGITAL VIDEO TRANSCRIPT
VS.)	
)	CASE NO. 061700802
BRYAN WATERFIELD,)	
)	
DEFENDANT.)	

SEPTEMBER 8, 2008

PRETRIAL CONFERENCE

HONORABLE JON M. MEMMOTT

APPEARANCES:

FOR THE PLAINTIFF: MR. MATTHEW T. JOHNSON

FOR THE DEFENDANT: MR. RYAN J. BUSHELL

FILED
UTAH APPELLATE COURTS

FEB 27 2009
ORIGINAL
20080949-09

1 SEPTEMBER 8, 2008.

2 **THE COURT:** STATE OF UTAH VERSUS BRYAN WATERFIELD.

3 BEFORE WE ADDRESS THE RULING OF LEGAL COUNSEL, LET ME JUST
4 TELL YOU. UNDER -- BECAUSE OF ALL THE ISSUES THAT HAVE BEEN
5 RESOLVE AND MANY DIFFICULTIES, I -- UNDER RULE 22(E) HAD
6 REVIEWED THE SENTENCE THAT I ISSUED ON MARCH 14TH -- OR
7 APRIL 14TH. APRIL 14, 2008. AND IN THIS CASE UNDER RULE
8 22(E) I HAVE THE PREROGATIVE OF CORRECTING ILLEGAL SENTENCE
9 AT ANY TIME ON MY OWN. IN REVIEWING THE SENTENCE THAT WAS
10 ISSUED IN THIS CASE, AFTER WE HAD A SIGNIFICANT REVIEW OF
11 WHAT I SAID, I'M GOING TO REVOKE YOUR PROBATION AND SENTENCE
12 YOU TO ONE TO 15 YEARS IN THE UTAH STATE PRISON ON EACH OF
13 THOSE TO RUN CONCURRENTLY. I'LL SUSPEND THE JAIL SENTENCE
14 AND SENTENCE YOU TO RSAT.

15 THAT WAS AN IMPROPER SENTENCE. I HAD TO SUSPEND THE
16 PRISON SENTENCE. I HAD TO SENTENCE HIM TO JAIL AND THEN HAVE
17 HIM REVIEWED BY RSAT. I DID NOT DO THAT. SO THE SENTENCE
18 THAT I GAVE WAS AN IMPROPER SENTENCE. AND THEREFORE, I AM
19 GOING TO SUSPEND THAT SENTENCE AND WE'RE BACK RIGHT THERE.
20 WE'RE AT THE DATE OF APRIL 14. HE HAS JUST ADMITTED HIS
21 PROBATION VIOLATIONS, AND SO NOW I'M GOING TO HAVE THAT
22 SENTENCING.

23 THE DIFFERENCE IS I'VE RECEIVED A PRESENTENCE REPORT
24 THAT I DIDN'T HAVE THEN. BUT A LOT OF THE ISSUES THEN ABOUT
25 THIS RSAT REVIEW AND ALL THOSE KIND OF THINGS ARE REALLY MOOT

1 BECAUSE I NEED TO GO BACK TO THE DATE THAT THE ILLEGAL
2 SENTENCE WAS IMPOSED WHICH WAS APRIL 14.

3 SO I'M SUSPENDING THAT SENTENCE AND I'M GOING TO
4 HAVE A PROPER SENTENCING ON HIS ADMISSIONS OF THE PROBATION
5 VIOLATIONS. THAT'S WHERE WE ARE.

6 NOW, IN DOING THAT I HAVE A PRESENTENCE REPORT. I
7 KNOW WHAT THE PRESENTENCE REPORT IS. THEY HAVE RECOMMENDED
8 PRISON. WHEN I DID THIS BEFORE, I CONSIDERED HIM SCREENING
9 FOR RSAT BECAUSE THAT IS A POTENTIAL OPTION WITH THE COURT.
10 WHAT I NEED TO DO IS I NEED TO FIND OUT AS THE COURT WHAT
11 TOOK PLACE, IF THAT WAS A VALID SCREENING OR NOT. WHAT TOOK
12 PLACE BETWEEN COUNSEL AND ADULT PROBATION AND PAROLE. WHAT
13 DISCUSSIONS, IF ANY, TOOK PLACE. WHETHER THERE WAS A PROPER
14 SCREENING. AND I NEED TO DO THAT TO MAKE SURE IF THAT IS AN
15 OPTION THAT HE BE SCREENED, THAT I'M SURE HE'LL RECEIVE AN
16 APPROPRIATE REVIEW, OR HE MAY NOT RECEIVE AN APPROPRIATE
17 REVIEW.

18 FURTHER IN THIS -- I KNOW THE STATE -- WE'RE GOING
19 TO SET SENTENCING AND I KNOW THE STATE'S POSITION. I SAW MR.
20 MR. WESTMORELAND WAS HERE. I SAW HIM HERE EARLIER.

21 **MR. JOHNSON:** HE HAD TO LEAVE, YOUR HONOR.

22 **THE COURT:** BUT I KNOW THE STATE'S POSITION IS THAT
23 I CANNOT REVIEW -- OR I CANNOT SENTENCE HIM BECAUSE OF THE
24 11(H) AGREEMENT.

25 **MR. JOHNSON:** THAT IS CORRECT, YOUR HONOR.

1 **THE COURT:** HE HAS FILED A MEMORANDUM. I HAD
2 SENTENCED HIM UNDER THE 11(H) AGREEMENT WHEN I SENTENCED HIM
3 TO PROBATION THE FIRST TIME. THAT WAS THE AGREEMENT THAT WE
4 SENTENCED TO. SO WHEN HE ENTERED A GUILTY PLEA, THE 11(H)
5 WAS THE SENTENCE THAT I SENTENCED HIM TO IN DECEMBER. THAT
6 WAS THE SENTENCE PURSUANT TO THE 11(H) AGREEMENT.

7 THE STATUTE -- THE UTAH STATUTE WHICH MR.
8 WESTMORELAND HAS NOT CITED TO THE COURT INDICATES IN
9 77-18-1.1(12)(E)(1). THIS IS WHERE -- NOW YOU SENTENCE
10 SOMEBODY AND NOW THEY HAVE A PROBATION VIOLATION 'CAUSE
11 THAT'S DIFFERENT THAN THE ORIGINAL SENTENCE. NOW SOMEBODY IS
12 COMING BEFORE YOU ON A PROBATION VIOLATION. THAT READS,
13 "AFTER A HEARING THE COURT SHALL MAKE FINDINGS OF FACT. ONE,
14 UPON A FINDING THAT THE DEFENDANT VIOLATED CONDITIONS OF
15 PROBATION, WHICH IS -- THAT'S WHERE WE ARE. WE'RE BACK TO.
16 I FOUND THAT HE STIPULATED. HE ADMITTED HE DID THAT. IN
17 FACT WENT INTO SOME DETAIL ABOUT HOW HE VIOLATED PROBATION.
18 IT SAYS, THE COURT MAY ORDER PROBATION, REVOKED, MODIFIED OR
19 THAT THE ENTIRE PROBATION TERM COMMENCE ANEW. AND THE SECOND
20 PART OF THIS: IF THE PROBATION IS REVOKED, THE DEFENDANT
21 SHALL BE SENTENCED OR THE SENTENCE PREVIOUSLY IMPOSED SHALL
22 BE EXECUTED. AND SO IT SEEMS LIKE THE STATUTE WHICH I THINK
23 MAY GOVERN OVER THE RULES IN THIS CASE BECAUSE I'M NOT
24 SENTENCING ON THE ORIGINAL SENTENCE. I'M SENTENCING HIM ON
25 THE PROBATION VIOLATION. AND WHAT THIS STATUTE SAYS IS THAT

1 IF THE PROBATION IS REVOKED, WHICH I DID, THEN THE DEFENDANT
2 SHALL BE SENTENCED OR THE SENTENCE PREVIOUSLY IMPOSED SHALL
3 BE EXECUTED. SO I THINK THAT'S WHERE I'M EITHER GOING TO THE
4 PREVIOUS SENTENCE WHICH WAS CONSECUTIVE TERMS OF ONE TO 15 OR
5 I CAN ENTER A SENTENCE. AND WHAT I'M GOING TO DO IS HAVE THE
6 SENTENCING HEARING NOW. I'M GOING TO ALLOW THE STATE TO
7 PRESENT WHATEVER EVIDENCE THEY WANT TO. I'M GOING TO ALLOW
8 YOU TO PRESENT WHATEVER EVIDENCE YOU WANT TO. AND THEN THE
9 COURT IS GOING TO ENTER A PROPER SENTENCE. AND THAT'S WHERE
10 WE ARE.

11 NOW WITH THAT, I DON'T KNOW IF YOU WANT TO DISMISS
12 MR. BUSHELL OR WHAT YOU WANT TO DO, BUT WE NEED TO SET THE
13 TIME AND DATE FOR THIS SENTENCING TO TAKE PLACE SO THAT BOTH
14 OF YOU HAVE ADEQUATE TIME TO PRESENT WHATEVER EVIDENCE THAT
15 YOU WANT TO PRESENT TO THE COURT AND THAT WE HAVE A
16 SENTENCING HEARING, A PROPER SENTENCING HEARING AND THEN WE
17 SENTENCE.

18 AND I THINK UNDER RULE 22(E), WITH THAT CORRECTION,
19 I HAVE CORRECTED IT. BUT PRIOR TO THAT SENTENCING, I NEED TO
20 RESOLVE THIS ISSUE ABOUT RSAT AND ABOUT WHAT TOOK PLACE. AND
21 SO I HAVE AN UNDERSTANDING OF -- IF IT'S GOING -- IF THAT'S
22 GOING TO BE HANDLED PROPERLY OR PREJUDICED SO MUCH THAT IT
23 CAN'T BE DONE PROPERLY. THAT'S AN INDEPENDENT REVIEW THAT
24 THIS COURT IS GOING TO HAVE TO DO PRIOR TO THAT SENTENCE.

25 **MR. BUSHELL:** YOUR HONOR, WITH RESPECT TO THE

1 QUESTION WITH REGARDS TO MY STAYING ON THE CASE, IT WAS JUST
2 SOME MISUNDERSTANDING ON WHAT MR. WATERFIELD SAW WHAT
3 ACTUALLY HAPPENED LAST TIME WE WERE HERE. RICK AND I DO KNOW
4 EACH OTHER. WENT TO LAW SCHOOL TOGETHER. BEFORE WE CAME TO
5 WORK FOR THE COUNTY ATTORNEYS OFFICE. WE OFFICED TOGETHER.
6 WE WERE NOT PARTNERS BY ANY MEANS, BUT WE KNOW EACH OTHER.
7 WE'RE BOTH FRIENDS WITH EACH OTHER.

8 AND AFTER COURT AS BRYAN WAS LEAVING I SLAPPED RICK
9 ON THE BACK 'CAUSE HE MADE THAT MOTION. I SAID THANKS FOR
10 ALL THE WORK I HAD TO DO, IN A SARCASTIC MANNER.
11 MR. WATERFIELD THOUGHT I WAS CONGRATULATING HIM ON WINNING.
12 THAT WAS NOT THE CASE.

13 I WENT DOWN LAST WEEK AND ST WITH BRYAN AND TALKED
14 AND WE'RE FINE. WE'RE READY TO CONTINUE FORWARD WITH THIS
15 CASE.

16 **THE COURT:** HOW MUCH TIME DOES EACH SIDE NEED FOR
17 THE SENTENCE. AND I NEED THE OTHER REVIEW TO TAKE PLACE
18 PRIOR TO THE SENTENCING. BECAUSE THERE'S SOME ISSUES RAISED
19 THAT RAISE SOME REALLY TROUBLING ISSUES TO THE COURT.

20 **MR. JOHNSON:** THERE WAS A HEARING SET FOR THE 29TH,
21 YOUR HONOR.

22 **MR. BUSHELL:** I WAS GOING TO ASK TO MOVE THAT
23 HEARING ONE ADDITIONAL WEEK SO I CAN GATHER SOME MORE
24 INFORMATION. I'M GOING TO HAVE TO SUBPOENA SOME PEOPLE.

25 **THE COURT:** AND SOME WAYS WHAT HAPPENED WAS -- I

1 DON'T KNOW WE NEED A HEARING BECAUSE THAT'S MOOT. BECAUSE
2 WHAT I'VE DONE TODAY THAT IS MOOT. WHAT I WANT TO DO, BUT I
3 DO WANT TO KNOW WHAT HAPPENED BECAUSE IF THERE WAS AN
4 IMPROPER COMMUNICATION BETWEEN THE PROSECUTOR AND AP&P, IF
5 THERE REALLY WASN'T A PROPER EVALUATION BECAUSE OF SOME
6 THINGS THAT TOOK PLACE, I NEED TO KNOW. BECAUSE THAT'S GOING
7 TO AFFECT FURTHER SENTENCING IN THIS CASE. AND THOSE THINGS
8 ARE GOING TO HAVE TO BE PRESENTED TO THE COURT, PARTICULARLY
9 IF DISCLOSURE OF SOME THINGS WERE NOT ACCURATE AND CORRECT.
10 THOSE HAVE ARE VERY IMPORTANT THINGS.

11 SO DO YOU WANT TO DO THAT -- I MEAN, AND I DON'T
12 EVEN KNOW BECAUSE OF THE NATURE OF THIS IF THE PARTIES AGREED
13 ON WHAT TOOK PLACE AND PRESENTED THE COURT ON BOTH SIDES. I
14 DON'T KNOW. I DON'T KNOW. AND IT IS REALLY BECAUSE IT
15 DOESN'T AFFECT THE SENTENCE. THIS ISN'T A RIGHT THAT
16 MR. WATERFIELD HAS TO PRESENT AND TO DO THIS. I'M DOING THIS
17 AS THE JUDGE IN THIS CASE, SENTENCING JUDGE, WHERE I HAVE
18 PEOPLE COME BEFORE ME AND I HAVE A CONCERN ABOUT WHETHER THEY
19 HAVE BEEN COMPLETELY OPEN AND HONEST WITH THE COURT AND IT
20 AFFECTS MY ABILITY TO SENTENCE THEN WITH THE ROLE OF A
21 PROSECUTOR, AP&P AND IT RELATES TO THE COURT AND
22 REPRESENTATIONS BEFORE THE COURT. IT'S A LITTLE DIFFERENT
23 CIRCUMSTANCES. THE ISSUE OF THEM REPORTING IT AS A VIOLATION
24 IS ALL MOOT WHEN I SENTENCE HIM FOR THAT. SO THAT ISSUE IS
25 MOOT. SO MR. WATERFIELD GETTING -- HAVING YOU, MR. BUSHELL,

1 COMING ON TO CROSS EXAMINE -- ALTHOUGH MAYBE THE COURT WILL
2 SUBPOENA THE RECORDS RATHER THAN YOU SUBPOENA THE RECORDS. I
3 DON'T KNOW IF I NEED TO SUBPOENA THE RECORDS. I THINK I CAN
4 HOPEFULLY ASK FOR THE RECORDS.

5 MR. BUSHELL: CAN WE SET THAT HEARING ON THE 6TH AND
6 AT THAT TIME DO WE SET SENTENCING. SINCE YOU ALREADY HAVE A
7 P.S.I.

8 THE COURT: WE COULD.

9 MR. JOHNSON: WILL THAT BE AT 11, YOUR HONOR, THE
10 HEARING ON THE 6TH?

11 THE COURT: AGAIN, I DON'T KNOW IF THERE NEEDS TO
12 HAVE A HEARING, BUT I NEED --

13 MR. BUSHELL: I'LL SPEAK TO MR. WESTMORELAND.

14 THE COURT: IF YOU NEED A CLARIFICATION. MR.
15 BUSHEL -- I WOULD LIKE MR. BUSHELL TO PARTICIPATE BECAUSE
16 HE'S GOING TO BE DOING THE SENTENCING ON BEHALF OF HIS
17 CLIENT, BUT HE NEEDS TO GET THE INFORMATION. BUT IT'S NOT A
18 FORMAL HEARING.

19 MR. BUSHELL: I WON'T HAVE CROSS-EXAMINATION RIGHTS.

20 THE COURT: YES. I JUST NEED TO KNOW WHAT HAS TAKEN
21 PLACE. I HAVE AN AFFIDAVIT -- PART OF IT, QUITE HONESTLY,
22 THE AFFIDAVIT THAT REALLY DIDN'T DO THE ASAM EVALUATION, THE
23 SCREENING REALLY DIDN'T TAKE PLACE AND REPRESENTED TO THE
24 COURT THAT IT DID. THAT'S A BIG CONCERN FOR THIS COURT IS
25 WHAT REALLY TOOK PLACE. THERE WERE REPRESENTATIONS MADE IN

1 COURT AND THEN THERE WERE REPRESENTATIONS MADE AFTERWORDS
2 BASED ON EVERYTHING ELSE THAT WHAT WAS REPRESENTED TO THE
3 COURT REALLY DIDN'T TAKE PLACE. I JUST NEED TO KNOW AND I
4 NEED TO HAVE SOME UNDERSTANDING SO THAT I KNOW BECAUSE I NEED
5 TO INSURE WHEN HE -- I DO THE SENTENCING THIS TIME IT'S GOING
6 TO BE A FAIR SENTENCING WITH ALL THE RIGHTS.

7 **MR. BUSHELL:** WHO DID THE P.S.I.

8 **THE COURT:** WHOEVER DID -- I THINK THERE WERE TWO
9 INDIVIDUALS.

10 **UNIDENTIFIED VOICE:** DAVE HOFFMAN.

11 **THE COURT:** PART OF THIS, THE DIFFICULT SITUATION IS
12 MR. WESTMORELAND ALSO REPRESENTED THAT HE THOUGHT THEY HAD
13 BEEN DONE AND HE HAD PERSONAL KNOWLEDGE THEY HAD BEEN DONE
14 AND THOSE KIND OF THINGS. SO I'M CONCERNED POSSIBLY THAT
15 SOME OF HIS REPRESENTATIONS (UNINTELLIGIBLE) I JUST NEED IT
16 CLARIFIED AND KNOW WHERE WE ARE.

17 **MR. BUSHELL:** AND MR. WESTMORELAND WILL BE HERE FOR
18 THAT.

19 **MR. JOHNSON:** HE WILL.

20 **THE COURT:** AND I WOULDN'T MIND THE INFORMATION
21 COMING TO ME BEFORE THE HEARING. I JUST WANT TO KNOW WHAT
22 HAPPENED. THAT'S ALL. I WANT TO KNOW WHAT TOOK PLACE. AND
23 MAYBE WE'LL GET INTO THE WHYS, BUT I NEED TO KNOW WHAT TOOK
24 PLACE IN THIS CASE. WE COULD GO ON FOR A LONG TIME. THAT'S
25 WHY I WENT BACK AND GRANTED A SENTENCE BECAUSE I WANT IT THIS

1 DONE RIGHT. ANY QUESTIONS ABOUT WHERE I AM?

2 **MR. BUSHELL:** NO, YOUR HONOR. DO WE HAVE A DATE SET

3 FOR AFTER THAT HEARING FOR SENTENCING?

4 **THE COURT:** WE CAN. I DON'T KNOW IF MR.

5 WESTMORELAND WANTS TO PURSUE HIS 11(H) MOTION UNDER

6 SENTENCING GIVEN THE STATUTE, GIVEN WE ARE AT. IF HE DOES,

7 THEN HE CAN FILE THAT MOTION.

8 **MR. JOHNSON:** HE MAY, YOUR HONOR. I DON'T KNOW.

9 (END OF PROCEEDINGS.)

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CERTIFICATE

STATE OF UTAH)
) SS.
COUNTY OF DAVIS)

I, JOANNE PRATT, DO HEREBY CERTIFY THAT THE
FOREGOING 10 PAGES OF TRANSCRIPT CONSTITUTE A TRUE AND
ACCURATE RECORD OF THE ABOVE-REFERENCED PROCEEDING TO THE
BEST OF MY KNOWLEDGE AND ABILITY AS AN OFFICIAL COURT
REPORTER IN AND FOR THE STATE OF UTAH.

DATED THIS 23 DAY OF JANUARY, 2009.


JOANNE PRATT, RPR

Tab C

10/14/2008 8:57:32 AM1397



2nd District - Farmington
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCING
: SENTENCE, JUDGMENT, COMMITMENT
:
:
vs. : Case No: 061700802 FS
:
BRYAN WATERFIELD, : Judge: JON M MEMMOTT
Defendant. : Date: October 6, 2008

Minutes 10/6/08 - Sentence, Judgment, Commitment



CD24571207

pages 3

061700802 WATERFIELD,BRYAN

PRESENT
Clerk: kellyr
Prosecutor: WESTMORELAND, RICK T
Defendant
Defendant's Attorney(s): BUSHELL, RYAN J

DEFENDANT INFORMATION

Date of birth: January 11, 1967

Video

Tape Number: 7-100608 Tape Count: 11:21/12:39

CHARGES

1. DISTRIBUTE/OFFER/ARRANGE TO DIST C/S - 2nd Degree Felony
Plea: Guilty - Disposition: 12/10/07 Guilty
5. POSSESSION OF A CONTROLLED SUBSTANCE (amended) - 2nd Degree Felony
Plea: Guilty - Disposition: 12/10/07 Guilty

HEARING

Defendant is present in custody. A ruling has been given to counsel regarding the State's motion to strike sentencing hearing for lack of subject matter jurisdiction. Counsel have reviewed the ruling. The Court has found it does have subject matter jurisdiction. The State has previously also filed a motion to enforce plea agreement pursuant to rule 11(i) of the Utah Rules of Criminal Procedure and request for oral argument. Mr. Bushell did not file a response, he understood this to be a mute point and that the Court had previously ruled on this. Mr. Westmoreland presents argument. Mr. Bushell presents argument.

10/14/2008 8:57:32 AM 1398

Case No: 061700802
Date: Oct 06, 2008

The Court finds that the wording in the plea agreement did not bind this Court. Previously the Court found the sentencing which included RSAT was an illegal sentence. Today for sentencing the Court has received a post sentencing report and

recommendation, which have been reviewed. Today will deal with the sentencing on the probation violation which the defendant has previously admitted to.

Regarding sentencing: Mr. Bushell, Mr. Westmoreland each make statements.

11:55 Court is in recess.

11:59 Court reconvenes. Sentencing proceeds. Mr. Bushell addresses some corrections to the post-sentencing report. For sentencing for the State, Agent Trent Wynn of AP&P, Agent Kim Holden of AP&P, Officer Mia and Mr. Westmoreland

address the Court. For the defendant, Mr. Bushell, defendant's mother Avalon Waterfield and the defendant each address the Court. Sentencing proceeds as follows:

SENTENCE PRISON

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE TO DIST C/S a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of POSSESSION OF A CONTROLLED SUBSTANCE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the DAVIS County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

10/14/2008 8:37:32 AM 1399

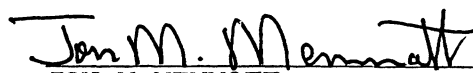
Case No: 061700802
Date: Oct 06, 2008

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Sentences are to run CONSECUTIVE.

Prison Recommendation: Defendant be considered for Conquest Program, and if that is completed, it is recommended defendant be considered for the Drug Board Program. Further recommendations are defendant be granted credit for time served since May 19, 2008, pay a \$500.00 public defender fee and pay \$520.00 in restitution to the Davis County Metro Narcotics Unit.

Dated this 8th day of Oct, 20 08.


JON M MEMMOTT
District Court Judge

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